Supreme Court, U.S.
FILED

001188 JAN 22 2001

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

DEBBIE MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Irene M. McLafferty, Esquire
J. Craig Currie & Associates
Two Penn Center Plaza
Suite 1032
1500 John F. Kennedy Boulevard
Philadelphia PA 19102
(215) 564-0833

Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

62pp

QUESTION PRESENTED

Should the United States Supreme Court resolve the conflict between the circuits as to whether the government or a plaintiff has the burden of establishing the applicability of the discretionary function exception under the Federal Tort Claims Act?

PARTIES TO THE ACTION

DEBBIE MITCHELL

Petitioner

UNITED STATES OF AMERICA

Respondent

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4

TABLE OF AUTHORITIES

Page

CASES

AIG Aviation Insurance Services, Inc. v. United States, 885 F.Supp. 1496 (D. Utah 1995) 7

Alef v. United States, 990 F. Supp. 932 (W.D. Mich. 1997) 5

Aragon v. United States, 146 F.3d 819 (10th Cir. 1998) 7

Autery v. United States, 992 F.2d 1523 (11th Cir. 1993) 9

Barrett v. United States, 845 F. Supp. 774 (D. Kan. 1994) 9

Carlyle v. United States, 674 F.2d 554 (6th Cir. 1982) 6

Cazales v. United States, 994 F. Supp. 765 (S.D. Tx. 1997) 5

Cestonaro v. United States, 211 F.3d 749 (3rd Cir. 2000) 10

Claypool v. United States, 103 F. Supp. 899 (S.D. W.Va. 2000) 9

Daigle v. United States, 972 F.2d 1527 (10th Cir. 1992) 9

Davis v. United States, 918 F. Supp. 368 (N.D. Fl. 1996) 6

Gotha v. United States, 115 F.3d 176 (3rd Cir. 1997) 10

Hall v. United States, 825 F. Supp. 427 (D. N.H. 1993) 7

McElroy v. United States, 861 F. Supp. 585 (W.D. Tex. 1994) 9

TABLE OF AUTHORITIES – Continued

Page

Mesa v. United States, 123 F.3d 1435 (11th Cir. 1997) 9

Miller v. United States, 710 F.2d 656 (10th Cir. 1983), cert. denied, 464 U.S. 939, 104 S.Ct. 352, 78 L.Ed.2d 316 (1983) 7, 8

National Union Fire Insurance v. United States, 115 F.3d 1415 (9th Cir. 1997), cert. denied, 522 U.S. 1116, 118 S.Ct. 1053, 140 L.Ed.2d 116 (1998) 5, 10

Nyazie v. Kennedy, 1998 WL 32601 (E.D. Pa. 1998) 9

Ochran v. United States, 117 F.3d 495 (11th Cir. 1997) 9

Prescott v. United States, 973 F.2d 696 (1992) 5, 6, 8

Sigman v. United States, 208 F.3d 760 (9th Cir. 2000) 5

Stewart v. United States, 199 F.2d 517 (7th Cir. 1952) 6

United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991) 3, 8, 9

Val-U Construction v. United States, 905 F. Supp. 728 (D. S.D. 1995) 8

Valdez v. United States, 56 F.3d 1177 (9th Cir. 1995) 5

Williams v. United States, 50 F.3d 299 (4th Cir. 1995) 7

Wright v. United States, 868 F. Supp. 930 (E.D. Tenn. 1994) 9

OTHER AUTHORITIES

Ugo Colella & Adam Bain, *The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation*, 67 Fordham L. Rev. 2859 (1999) 8, 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254 1

28 U.S.C. § 2680(a) 2, 6

28 U.S.C. § 1346(b), *et seq.* 1, 2

PETITION FOR WRIT OF CERTIORARI

Petitioner Debbie Mitchell respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 28, 2000.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-13) is reported at 225 F.3d 361. The ruling of the District Court (App. 16-42) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The judgment of the court of appeals (App. 14-15) was entered on August 28, 2000; Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* was denied on October 25, 2000.

STATUTE INVOLVED

The provisions of this chapter and section 1346(b) of this title shall not apply to –

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a

discretionary function or duty on the part of the federal agency or an employee of the government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a)

STATEMENT OF THE CASE

On July 27, 1993, Petitioner Debbie Mitchell, then 36 years old, suffered grievous injuries when her car was caused to lose control because of a four inch drop-off between the macadam and the shoulder. Subsequently, her car struck head-on a stone culvert five feet from the edge of the road in the Delaware Water Gap National Recreational Area in Pennsylvania. At the time of the accident, the Delaware Water Gap National Recreation Area was under the control of the National Park Service ("NPS"). Mitchell brought suit against the United States in the United States District Court for the Middle District of Pennsylvania, pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), *et seq.*, under which the United States may be held liable for negligence. At trial, Ms. Mitchell contended that the drop-off reflected negligent maintenance of the highway, and that the culvert was an unguarded "roadside hazard."

Although the United States enjoys sovereign immunity, the FTCA operates as a waiver that permits injured parties to sue the government in tort. This waiver is subject to the "discretionary function" exception, which states that the government cannot be held liable for conduct taken to perform a discretionary function. *See*, 28 U.S.C. § 2680(a). To determine whether conduct has been

performed pursuant to a discretionary function, the Supreme Court has stated that the inquiry should focus on the "nature of the actions taken and on whether they are susceptible to policy analysis." *United States v. Gaubert*, 499 U.S. 315, 325, 111 S.Ct. 1267, 1274, 113 L.Ed.2d 335, 348 (1991).

Ms. Mitchell alleged that the United States had failed to eliminate dangerous roadside hazards and to properly maintain the portion of road where the accident occurred. The case was tried to the Court, which issued a Memorandum Opinion, along with Findings of Fact and Conclusions of Law. The District Court found that the government was liable under the FTCA and that the plaintiff had not been contributorily negligent.

The government appealed to the Third Circuit, claiming that the discretionary function exception to the FTCA shielded it from liability, despite the finding of negligence. No evidence was presented on this issue at trial; instead, it was resolved by the Court's denial of the government's motion for summary judgment. In support of that motion, the government relied on an affidavit from an NPS supervisor and NPS guidelines. Contrary to the trial court, the Circuit Court found these materials sufficient to establish that the government's action in not repairing the road fell within the discretionary function exception. In so ruling the Third Circuit panel accorded the government the benefit of every possible favorable inference that could be teased out of the superficial affidavit. In this manner, the Third Circuit clearly placed the burden of proving the inapplicability of the discretionary function exception on the claimant, Ms. Mitchell. The Third Circuit did not expressly address the question of

upon whom the burden rests, but the Court's reversal of the Trial Court necessarily required it to place that burden on the claimant. This is the only way the Third Circuit could reach the result it did. Stated differently, the Third Circuit's holding amounts to an unequivocal declaration by deed rather than word of its position on this issue.

REASONS FOR GRANTING THE WRIT

This matter is ripe for review by the Supreme Court. It is a matter of substantial importance because it implicates the goal of uniform application of federal laws throughout the nation. The issue is frequently before the Courts, but has been decided differently from Circuit to Circuit. The Fifth, Sixth, Ninth and Eleventh Circuits have all announced decisions which treat the exception as an affirmative defense and place the ultimate burden on the government. The First, Fourth, Eighth and Tenth Circuits have all held that the question is one of jurisdiction and that, therefore, the plaintiff must bear the ultimate burden. The Eleventh Circuit has repeatedly recognized that there is no clear answer to the question, and the Second has not articulated any position. The Third Circuit has split on the issue.

The importance of this matter goes well beyond the concerns of the Petitioner. Any claimant who seeks redress from the government by means of the FTCA will be affected by a decision of the Supreme Court in this matter. Approximately 3000 tort cases are filed against the United States each year, an increase of over 30% in the

last three decades.[1] This means that a steadily rising number of individuals and federal agencies are affected by the administration of the FTCA.

The United States enjoys broad sovereign immunity which can only be overcome by the FTCA's affirmative waiver. The discretionary function exception to that waiver is fatal to a plaintiff's claim, and litigants, including the government agencies, are not only entitled to know in advance whether they have the burden of showing the exception's applicability, they are entitled to have the burden allocated the same regardless of where the claim is filed.

The Circuits are in clear conflict over this issue. The more reasoned decisions flow from the Ninth Circuit's opinion in *Prescott v. United States*, 973 F.2d 696 (1992). That decision analogized the discretionary function exception to an affirmative defense that the government had the ultimate burden of proving. *See, id.* at 702. Since the *Prescott* decision, the Ninth Circuit and others have adopted this approach to allocating the burden. *See, e.g., Sigman v. United States*, 208 F.3d 760 (9th Cir. 2000); *National Union Fire Insurance v. United States*, 115 F.3d 1415 (9th Cir. 1997), cert. denied, 522 U.S. 1116, 118 S.Ct. 1053, 140 L.Ed.2d 116 (1998); *Valdez v. United States*, 56 F.3d 1177 (9th Cir. 1995); *Alef v. United States*, 990 F. Supp. 932 (W.D. Mich. 1997); *Cazales v. United States*, 994

---

[1] 1999 Report of the Director of Administrative Office of the United States Courts, p. 142; 1970 Report of the Director of Administrative Office of the United States Courts, p. 231. The number of tort cases filed against the United States in 1970 was 1,972. In 1999 the number was 2,932. *See, id.*

F. Supp. 765 (S.D. Tx. 1997); *Davis v. United States*, 918 F. Supp. 368 (N.D. Fl. 1996).

In *Prescott*, the Ninth Circuit looked to two previous decisions which placed the burden on the government. *Stewart v. United States*, 199 F.2d 517 (7th Cir. 1952) suggested that the exceptions to the waiver of immunity are really affirmative defenses. Much later, the Sixth Circuit reviewed the holding in *Stewart* and realized that the exception *did* implicate jurisdiction (which would ordinarily shift the burden to the claimant), but that the plaintiff should not be saddled with the burden of disproving all exceptions simply to establish jurisdiction. *See, Carlyle v. United States*, 674 F.2d 554, 556 (6th Cir. 1982). The Court stated that "only after a plaintiff has successfully invoked jurisdiction by a pleading that facially alleges matters not excepted by § 2680 does the burden fall to government to prove the applicability of a specific provision of § 2680." *Id.* The *Prescott* Court took elements of both *Stewart* and *Carlyle* to provide its influential holding:

> Because an exception to the FTCA's general waiver of immunity, although jurisdictional on its face, is analogous to an affirmative defense, we believe the Sixth and Seventh Circuits correctly placed the burden on the United States as the party which benefits from the defense. Today we follow these two circuits and adopt the rule as set forth by the Sixth Circuit in *Carlyle*. We thus hold explicitly that the United States bears the burden of proving the applicability of one of the exceptions to the FTCA's general waiver of immunity.
>
> *Prescott* at 702.

Despite this firm holding and the number of opinions that have adopted its rationale, there are just as many opinions which hold that the question is one of jurisdiction *and* that the burden must ultimately be borne by the plaintiff. The strongest statement of this position has come from the Tenth Circuit. In *Miller v. United States*, 710 F.2d 656 (10th Cir. 1983), cert. denied, 464 U.S. 939, 104 S.Ct. 352, 78 L.Ed.2d 316 (1983), the Court noted that "the discretionary function exception poses a jurisdictional prerequisite to suit, which the plaintiff must ultimately meet as part of his overall burden to establish subject matter jurisdiction." *Id.* at 662, citing *Baird v. United States*, 643 F.2d 437, 440 (10th Cir. 1981), cert. denied, 454 U.S. 1144, 102 S.Ct. 1004, 71 L.Ed.2d (1982). The majority of cases in the Tenth Circuit have followed *Miller*. *See, e.g., Aragon v. United States*, 146 F.3d 819, 823 (10th Cir. 1998); *AIG Aviation Insurance Services, Inc. v. United States*, 885 F.Supp. 1496, 1498 (D. Utah 1995). The *Miller* opinion has also been instructive to Courts in other parts of the nation. "The court's review of the case law suggests that it is incumbent on the plaintiffs to show that their case falls outside the prospective bounds of the 'discretionary function' exception. That is, the plaintiffs bear the burden of establishing the Court's jurisdiction under the FTCA." *Hall v. United States*, 825 F. Supp. 427, 433 (D. N.H. 1993) citing *Miller*, supra.

There are also a handful of cases which adopt the *Miller* standard as an essential element of their holding without an explicit citation to *Miller*. In *Williams v. United States*, 50 F.3d 299 (4th Cir. 1995), the Court recognized the jurisdictional issue, but cited its holding only in terms of civil procedure. "The plaintiff bears the burden of

persuasion if subject matter jurisdiction is challenged under Rule 12(b)(1), because the party who sues the United States bears the burden of pointing to an unequivocal waiver of immunity." *Id.* at 304 (Citations omitted). In *Val-U Construction v. United States*, 905 F. Supp. 728 (D. S.D. 1995), the District Court found that the discretionary function exception applied, stating that the plaintiff had not met its burden of showing the exception's inapplicability. *See, id.* at 736. In both instances, it was essential for the Courts to allocate the ultimate burden onto the plaintiff in order to reach their conclusions.

In the instant case, the lower Court adopted the same approach as the *Val-U Construction* Court, namely that once the exception had been invoked by the government, the burden shifts to the plaintiff to disprove its applicability. This very same approach is advocated in a recent law review article that criticizes the *Prescott* holding. *See,* Ugo Colella & Adam Bain, *The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation*, 67 Fordham L. Rev. 2859 (1999). This article highlights the polarization over this issue and the need for guidance from the Supreme Court. Both the article and many of the decisions that have affirmed the *Miller* position on jurisdiction take *United States v. Gaubert*, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991) as their starting point. This is the leading case on whether or not the discretionary function exception applies, but it does not contain a clear holding about who has the burden of establishing applicability. Opponents of *Prescott* look to the following language for guidance.

> For a complaint to survive a motion to dismiss [based on the discretionary function exception],

> it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.
>
> *Gaubert*, 499 U.S. at 324-325, 111 S.Ct. 1274-1275, 113 L.Ed.2d at 348.

Some Courts have read this language to mean that the plaintiff has the whole burden of proving that the exception does not apply. *See, e.g. Wright v. United States*, 868 F. Supp. 930, 932 n.5 (E.D. Tenn. 1994); *McElroy v. United States*, 861 F. Supp. 585, 592 n.12 (W.D. Tex. 1994). Colella and Bain take a different position, which reads like a blueprint for the approach that the government took in the lower Court here. They suggest that the government should obtain the benefit of a presumption that the exception applies by showing relevant policies, procedures or guidelines. *See*, Colella & Bain, supra. at 2929-2930. Once the government shows that guidelines exist, the burden then shifts to the plaintiff to show that such guidelines do not satisfy the discretionary function exception standard under *Gaubert*.

The lack of a clear guideline on this matter has left numerous courts and countless litigants groping in the dark. Again and again courts of various jurisdictions have come upon this issue and declined to render a holding because of the lack of clear precedent. *See, e.g. Mesa v. United States*, 123 F.3d 1435, 1439 n.6 (11th Cir. 1997); *Ochran v. United States*, 117 F.3d 495, 504 n.6 (11th Cir. 1997); *Autery v. United States*, 992 F.2d 1523, 1526 n.6 (11th Cir. 1993); *Daigle v. United States*, 972 F.2d 1527, 1542 (10th Cir. 1992); *Claypool v. United States*, 103 F. Supp. 899, 902-903 (S.D. W.Va. 2000); *Nyazie v. Kennedy*, 1998 WL 32601, *4 n.7 (E.D. Pa. 1998); *Barrett v. United States*, 845

F. Supp. 774, 780 n.7 (D. Kan. 1994). This sampling of cases highlights prevalent confusion over this issue.

There is also inconsistency within some Circuits. For example, although the *Miller* decision appeared to have settled the issue in the Tenth Circuit, the *Daigle* decision cited above does not even mention *Miller*, and instead suggests that *Prescott* states the proper approach. *See, Daigle*, supra. at 1542 n.11. The lower Court in the instant case shifted the burden onto the plaintiff, yet in previous cases, the Third Circuit followed a *Prescott*-styled approach, stating that the government had the burden of proving the exception's applicability. *See, Cestonaro v. United States*, 211 F.3d 749, 756 n.5 (3rd Cir. 2000), *citing National Union Fire Insurance v. United States*, 115 F.3d 1415, 1417 (9th Cir. 1997), cert. denied, 522 U.S. 1116, 118 S.Ct. 1053, 140 L.Ed.2d 116 (1998); *Gotha v. United States*, 115 F. 3d 176, 181 (3rd Cir. 1997). In *Gotha*, supra, the government submitted an affidavit which the Court found unpersuasive. *Id.* According to Colella and Bain, and the *Mitchell* Court below, the affidavit should have satisfied the government's "burden of production" and the plaintiff would then have had the burden of disproving the exception's applicability. The *Gotha* Court instead left the burden on the government.

Decisions regarding which party must establish the applicability or inapplicability of the FTCA's discretionary function exception are literally "all over the map." The Circuits are in obvious conflict with one another and there is even inconsistency within some Circuits. On the one hand there is the approach of the Court below: the exception is a jurisdictional issue and the plaintiff bears the ultimate burden. On the other hand there is the

approach that analogizes the exception to an affirmative defense, the burden of which should ultimately be borne by the government. The only thing certain is the prevalence of uncertainty over this issue and the need for guidance from the Supreme Court.

Respectfully submitted,

Irene M. McLafferty, Esquire
J. Craig Currie & Associates
Two Penn Center Plaza
Suite 1032
1500 John F. Kennedy Boulevard
Philadelphia PA 19102
(215) 564-0833

Counsel of Record for Petitioner

Filed August 28, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3357

DEBBIE MITCHELL

v.

UNITED STATES OF AMERICA,
Appellant.

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 96-cv-00897)
District Judge: Honorable A. Richard Caputo

Argued: June 13, 2000
Before: SLOVITER, BARRY and ALDISERT,
Circuit Judges.
(Filed: August 28, 2000)

Mary C. Frye
United States Attorney
David M. Barasch
United States Attorney
David W. Ogden
Acting Assistant Attorney General
Office of United States Attorney
Federal Building
228 Walnut Street
P.O. Box 11754
Harrisburg, PA 17108

Robert S. Greenspan
United States
Department of Justice
Civil Division, Appellate Staff
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Douglas Hallward-Dreimeier
(Argued)
United States Department of Justice
Civil Division, Appellate Staff
601 D Street, N.W.
Washington, D.C. 20530

Attorneys for Appellant

J. Craig Currie (Argued)
Currie & Strawley
Two Penn Center
Suite 1032
Philadelphia, PA 19102

Attorney for Appellee

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

This appeal from the district court's judgment in favor of Appellee Debbie Mitchell in her complaint brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346, requires us to decide whether the National Park Service's choice not to repair or improve a drainage ditch and concrete head-wall located five feet west of a paved roadway came within the discretionary function exception to the Act so as to immunize the Service from

Mitchell's suit brought after she collided with a head-wall at the end of a drainage ditch.

Under the Federal Tort Claims Act, the United States waives sovereign immunity for torts involving "personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b). The FTCA carves out an exception to governmental liability and provides:

> The provisions of this chapter . . . shall not apply to –
>
> (a) Any claim based upon an act or omission of an employee of the Government . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government . . .

28 U.S.C. § 2680.

The United States contends on appeal that the National Park Service's decision not to repair or improve the drainage ditch and head-wall was a legitimate exercise of governmental discretion and thus not actionable under the FTCA. We agree with the government and will reverse.

The district court had federal question jurisdiction under 28 U.S.C. §§ 1346(b), 2671. This court has appellate jurisdiction over the final decision of the district court pursuant to 28 U.S.C. § 1291. The United States filed a timely notice of appeal under Rule 4(a), Federal Rules of Appellate Procedure. This court exercises plenary review

over the applicability of the discretionary function exception. *See United States Fidelity & Guaranty Co. v. United States*, 837 F.2d 116, 119 (3d Cir. 1988).

I.

The National Park Service, a bureau within the Department of the Interior, manages the nation's parks and recreational areas, including the Delaware Water Gap National Recreation Area, a unit of the National Park Service. Highway Route 209 runs through the Recreation Area and was designed, built and maintained by the Commonwealth of Pennsylvania. In 1983, the Commonwealth ceded State Route 209 to the United States as part of the Recreation Area.

Since the time the roadway was received from Pennsylvania, the Park Service has adopted a policy aimed at converting it from a commercial through-road to one used in connection with the Recreation Area itself. To this end, Congress enacted legislation closing the road to non-local commercial traffic and provided funding for the construction of a bypass in New Jersey, which was explicitly intended as an alternative to Route 209. In 1996, Congress provided that all commercial traffic not connected with the Recreation Area itself will be barred from Route 209 as of September 30, 2005.

Since 1983 the Park Service has performed necessary maintenance on the road. Because of the condition of the road as received from the Commonwealth, however, the Park Service has not had sufficient appropriations for a complete reconstruction, which has resulted in the Service setting priorities among work items. The Service

conducted an engineering study of the roads in the Recreation Area in 1986 that identified numerous bridges that were in need of reconstruction because of structural deficiencies, insufficient width and low load limits, and reported that "most of the paved roads in the Recreation Area are in need of an overlay in a minimum of ten years." App. at 154. The study recognized also that "[c]oncrete posts, telephone poles, culvert head-walls, and trees within the clear zone . . . may constitute a safety hazard." *Id.* Such encroachments existed "on nearly all road sections in the Park." *Id.* Because of the massive repairs needed, the Service was forced to determine priorities and repair the most urgent problems first. From 1989 to 1993 no accidents, other than Mitchell's, were attributed to the Eshback area of Route 209, and a 1992 traffic safety report did not cite this stretch of roadway as a high hazard area. *See* App. at 65.

On July 27, 1993 at approximately 7:30 p.m., Appellee Debbie Mitchell was driving her 1989 GMC pick-up northbound on Route 209 within the Delaware Water Gap National Recreation Area. The road is a two-lane asphalt road which has a posted speed limit of 45 MPH. Attempting to avoid an oncoming vehicle she believed was improperly in her travel lane, she swerved to the right, drove off the road, which had a 4-5 inch drop-off, and entered a grassy area which sloped slightly to the right. The grassy area was approximately 40-50 feet wide and constituted a "clear zone" in which she traveled in excess of 300 feet, at which point she turned to the left to reenter the road at a speed "no greater than 45 MPH." App. at 22. Mitchell over-corrected, crossed over the northbound travel lane and the southbound lane, drove off the

paved roadway, entered a drainage ditch and struck a concrete head-wall of a culvert on the north end of the ditch. The head-wall, culvert and ditch were all approximately five feet from the near edge of paved road. Mitchell was seriously injured.

The district court entered final judgment in Mitchell's favor, holding that the discretionary exception did not apply to the Service's acts and that Mitchell did not negligently operate her automobile. The United States now appeals. We do not meet the question of negligence because we hold that the court erred in not applying the discretionary function exception. Accordingly, we will reverse.

II.

In *United States v. Gaubert*, 499 U.S. 315, 322-323 (1991), the Court provides a two-part inquiry to guide the application of the discretionary function exception. First, a court must determine whether the act involves an "element of judgment or choice." 499 U.S. at 322. "The requirement of judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. . . .' " *Id.* (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)); *see also Cestonaro v. United States*, 211 F.3d 748, 753 (3d Cir. 2000).

Second, even if the challenged conduct involves an element of judgment, the court must determine "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-323 (quoting *United States v. Varig Airlines*, 467 U.S.

797, 813 (1984)). The "focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by the statute, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* at 325; *see also Cestonaro*, 211 F.3d at 753; *Sea-Land Serv. Inc. v. United States*, 919 F.2d 888, 892 (3d Cir. 1990).

A.

The government refers to the 1984 Park Road Standards as providing guidance to the Park Service. *See* App. 67-74; Appellee's App. at 1-5. In particular, the Standards read:

> Road safety and efficiency of operation depend on adequate levels of cyclic and preventative maintenance and repair, which are also essential to protect the Service's extensive capital investment in the physical facility constituted by park roads, parkways and bridges. Consequently, park roads shall be maintained to the standards to which they have been constructed or reconstructed, and in a condition that promotes safety and protects capital investment.

Appellee's App. at 3. The Standards "provide flexibility in the planning and design processes to allow for consideration of variations in types and intensities of park use, for wide differences in terrain and climatic conditions, and for protection of natural and cultural resources in National Park System areas." App. at 69. Furthermore, "[b]ecause of the resources preserved in the Federal land management areas, and the type of tourist use in such

areas, the roads in certain instances do not have to be constructed to normal highway standards." App. at 69.

Under these guidelines, the Park Service's decision about how and when to reconstruct Route 209 would seem to be a discretionary decision implicating a number of policy considerations. When the Park Service took over Route 209 from the Commonwealth, there were numerous aspects of the road's design, condition and safety that called for the Park Service's attention. The Service was forced to prioritize among these projects because of its restricted budget and its limited ability to make repairs.

Because the Park Service legitimately exercised discretion in determining the priority of road repairs and redesigns, this court must determine whether its exercise of discretion was of the type the exception was intended to shield.

B.

In making such decisions, the government must weigh social, economic and political policy. The Park Service was required to balance its mission of preserving the parklands against the severity of design flaws and the different levels of deterioration of the road as it was received from the Commonwealth. The Service's choice to focus on a few highly dangerous portions of the road rather than to distribute its finite resources along the whole of Route 209 is a policy choice this court should not second-guess.

The developing jurisprudence setting forth boundaries of the exercise of agency discretion has begun to

present certain guidelines. At one extreme, some courts have held that the agency decision went beyond the ambit of appropriate discretion when the agency ignored blatant safety hazards that could have been repaired through routine periodic maintenance mandated by explicit policy. In *ARA Leisure Services v. United States*, 831 F.2d 193 (9th Cir. 1987), a tour bus went off the road and rolled over a mountain pass in Denali Park, Alaska. Evidence showed that the National Park Service had permitted a road, "which had edges so soft as to be dangerous," to erode from an original width of 28 feet to 14.6 feet at the accident site. 831 F.2d at 195. Citing *Aslakson v. United States*, 790 F.2d 688, 693 (8th Cir. 1986), the court explained that the discretionary function exception does not apply "[w]here the challenged governmental activity involves safety considerations under an established policy rather than the balancing of competing public policy considerations." *ARA Leisure Serv.*, 831 F.2d at 195. Applying the same rationale, we held the Navy did not function within the ambit of statutory agency discretion when it failed to provide a handrail while requiring an employee to negotiate a steep unlighted 20 feet long path where there was evidence that two or three years before the accident the Navy had been asked to install a handrail. *Gotha v. United States*, 115 F.3d 176, 181 (3d Cir. 1997). This court reasoned that the Navy was not entitled to the protection of the discretionary function exception because the government failed to articulate a public policy rationale – military, social or economic consideration – that factored into its decision not to rebuild the stairway or install a handrail. *See Id.* at 181-182; *see also Cestonaro*, 211

F.3d at 757 (holding that because the National Park Service failed to show how providing some lighting, but not more, is grounded in policy objectives it was not protected by the discretionary function exception). We rejected the government's attempt to characterize the decision not to take action as one of national security: "This case is not about a national security concern, but rather a mundane, administrative, garden-variety, housekeeping problem that is about as far removed from the policies applicable to the Navy's mission as it is possible to get." *Id.* at 181.

Similarly, one of our sister circuits reached the conclusion that a failure to repair can fall under the discretionary function exception if it is based on a public policy rationale. The court in *Cope v. Scott*, 45 F.3d 445 (D.C.Cir. 1995), determined that the Park Service's decision not to repave a particularly slippery stretch of the Rock Creek Parkway was protected. *Id.* at 451. The court reasoned that "[d]etermining the appropriate course of action would require balancing factors such as Beach Drive's overall purpose, the allocation of funds among significant project demands, the safety of drivers and other park visitors, and the inconvenience of repairs as compared to the risk of safety hazards." *Id.*; *see also Baum v. United States*, 986 F.2d 716, 724 (4th Cir. 1993) ("The decision of how and when to replace a major element of a substantial public facility is . . . at bottom a question of how best to allocate resources.").

III.

From case law, it becomes apparent that in applying the teachings of *Gaubert*, the inquiry becomes fact-specific.

A.

It bears emphasis in this case that the Park Service inherited Route 209 from Pennsylvania in 1983. The record indicates that a study conducted shortly thereafter revealed numerous design and safety issues. A number of bridges were in need of repair or reconstruction due to structural deficiencies, insufficient width and load limitations. One bridge in particular was rapidly deteriorating. In addition, the report found that "on nearly all road sections in the park" there were obstructions within the desirable clear zone, including "[c]oncrete posts, telephone poles, culvert head-walls, and trees," some "within a foot or two of the edge of the pavement." App. at 154. Finally, the study indicated that most of the roads in the park would need to be resurfaced within the next ten years.

In determining whether to commit funds for a complete reconstruction of Route 209, the government had to consider the ultimate purpose of the road, whether it would continue as a major commercial through-road or whether its use would be scaled back to serve principally as a recreational road. The Park Service decided that it was desirable to turn Route 209 into a "scenic parkway[ ] such as Skyline Drive in Shenandoah National Park and Blue Ridge Parkway." App. at 65. Congress closed the road first to some and later to all non-park-related commercial traffic, and it allocated monies toward the construction of a bypass that would serve as an alternative to Route 209. However, Congress did not allocate funds for the complete reconstruction of the road itself.

In light of these larger policy decisions, the Park Service was forced to determine priorities among the desirable improvements to the recently ceded Route 209. Major structural deficiencies, such as the rapidly deteriorating bridge, understandably were "priority 1 work." App. at 154. Among the roadside obstructions that were present all along the park's roads, the Park Service report noted that those within one or two feet of the road were of particular concern.

B.

Unlike the roadway in *ARA Leisure Services* or the steep hillside lacking a guardrail in *Gotha*, the complaint here concerns a concrete culvert head-wall that was five feet west of the paved roadway. This embankment would only become dangerous to an operator of a vehicle when two conditions are present: (1) the operator proceeded northbound on a southbound lane, and (2) the operator drove the vehicle five feet off the road in the wrong direction. The Park Service had to balance the costs of the repairs of every culvert head-wall along Route 209, along with the other safety issues identified in the 1986 study, against the low risk of an accident. *See* App. at 65 (from 1989 to 1993 no accidents, other than Mitchell's, were attributed to the Eshback area of Route 209).

Under these circumstances we conclude that the Service's decision to determine its repair and design priorities came within the discretionary function exception to the FTCA. Unlike *Gotha*, the Park Service has articulated several policy considerations that are implicated in the Park Service's decision not to undertake a reconstruction

of all drainage ditches along Route 209. This case, therefore, falls in line with the major policy decisions at stake in *Cope* and not the "mundane, administrative, garden-variety, housekeeping problem" presented in *Gotha*, 115 F.3d at 181.

* * *

We have considered all other contentions raised by the parties and conclude that no further discussion is necessary. We hold that the discretionary function exception applies to the Park Service's decision not to repair or redesign the concrete culvert head-wall and thus the district court did not have jurisdiction to entertain a suit against the Service. The judgment of the district court will be reversed and the proceedings remanded to the district court with a direction to enter judgment in favor of the government.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3357

DEBBIE MITCHELL

v.

UNITED STATES OF AMERICA,

Appellant.

Appeal from the United States District Court for the Middle District of Pennsylvania
(D.C. No. 96-cv-00897)
District Judge: Honorable A. Richard Caputo

Argued: June 13, 2000

Before: SLOVITER, BARRY and ALDISERT, *Circuit Judges.*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was argued on June 13, 2000.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the district court entered March 12, 1999, be and the same is hereby reversed.

Costs taxed against Appellee. All of the above in accordance with the opinion of this court.

/s/ Marcia M. Waldron
Clerk

DATED: August 28, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PENNSYLVANIA

DEBBIE MITCHELL,	:	
Plaintiff	:	CIVIL ACTION NO.
vs.	:	3:CV-96-0897
UNITED STATES OF AMERICA,	:	(JUDGE CAPUTO)
Defendant	:	

MEMORANDUM

(Filed Mar. 12, 1999)

This is an action against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* The plaintiff seeks damages arising from a one vehicle accident in the Delaware Water Gap National Recreation Area which occurred on July 27, 1993. The plaintiff contends that the accident was the result of the defendant's negligence in design, construction and maintenance of Route 209, the main north/south roadway through the park. The defendant maintains it was not negligent and that the plaintiff was negligent to such a degree as to defeat her claim.

The findings of fact and conclusions of law which the Court has reached follow this Memorandum.

Essentially the facts in narrative form may be stated as follows: On July 27, 1993 at approximately 7:30 p.m. the plaintiff was operating her 1989 GMC pick-up northbound on Route 209 within the Delaware Water Gap National Recreation Area. State Route 209 is a two lane

asphalt road which has a posted speed limit of 45 MPH. The plaintiff, in attempting to avoid an oncoming vehicle improperly in her travel lane, swerved to the right, left the road and entered a grassy area which sloped slightly to the right. The grassy area was approximately 40-50 feet wide and constituted a clear zone in which plaintiff traveled for in excess of 300 feet, at which point she turned to the left, re-entered SR 209, crossed her travel lane and the oncoming lane, entered a drainage ditch and came to rest after striking the concrete head wall of a culvert on the north side of the ditch. The head wall, culvert and ditch were all approximately 5 feet from the near edge of SR 209. In the process of traversing the grassy area to the right of plaintiff's lane of travel, several pieces of furniture plaintiff was carrying in her truck fell off the truck onto the grassy area. There is no evidence that the plaintiff knew or had any reason to know when she entered the grassy area that it was a clear zone, i.e., that there were no obstructions or hazards in her line of travel. The plaintiff made no attempt to stop while traveling across the grassy area. Rather, plaintiff sought to leave the area and get back on the road that she had left.

There was a severe enough impact into the head wall of the culvert to cause very serious injuries to the plaintiff.

It should be noted that the Court has resolved the issue of whether the plaintiff's truck hit the embankment and not the head wall in favor of the plaintiff based upon the testimony of the witnesses and the photographs received in evidence. The truck was clearly pitching to the left in its final resting place. Moreover, Ranger

Mennenoh said he gained access to plaintiff through the passenger door and that he worked his way "down" to the plaintiff in order to administer to her while she was still in the truck. This is at odds with the defendant's contention and some witness testimony that the truck was level and resting on the top of the head wall. I find it was leaning to the left and that the front end of the truck was against the head wall.

There is the further contention that plaintiff was contributorily negligent for not having her truck under control when she re-entered the roadway. Had she done so she may not have crossed the road and hit the ditch wall and culvert head wall. On the other hand, it would appear that her pattern of panic was foreseeable. Given the awareness of a drop-off where she first left the roadway it is reasonable to conclude that she over-corrected or over-steered in anticipation of avoiding a step up from the grassy area to the road or the inability to make a clear and smooth entry into the proper lane. Therefore, it is my conclusion that she was neither contributorily or comparatively negligent.

The legal question in this case is whether the government was negligent in the maintenance of SR 209 so as to minimize the risk of danger to motorists and in particular to the plaintiff. That legal question in a case brought under the Federal Tort Claims Act is determined in accordance with the law of the place where the act or omission occurred; in this case Pennsylvania. 28 U.S.C. § 1346(b). Here there is no question that the culvert head wall and ditch 5 feet from SR 209 was a dangerous condition and it has been held that the government has the duty to minimize risks in areas adjacent to roadways

which the government has within its jurisdiction or control. *See Drew v. Laber*, 383 A.2d 941, 943 (Pa. 1978) (citing *Mitchell v. Rochester Borough*, 150 A.2d 338, 340 (Pa. 1959)); *Balla v. Sladek*, 112 A.2d 156, 159 (Pa. 1955) (citing *Rasmus v. Pennsylvania Railroad Co.*, 67 A.2d 660, 662 (Pa. Super. 1949)).

The government urges the case of *Felli v. PennDOT*, 666 A.2d 775 (Pa. Commw. 1995), is controlling. In *Felli*, the plaintiff left the road to the right, re-entered the road after traveling some distance, crossed over the entire roadway and went down a severe embankment on the opposite side of the road seriously injuring himself. The court said that while the government had a duty to minimize the risks posed by dangerous conditions, the plaintiff had to use the roadway in its ordinary and intended way in order to raise the duty on the part of the government to guard against the risks. The court held that since the cross-over pattern of this accident was not an ordinary use of the road, the accident was not foreseeable and therefore, the government was not negligent in not erecting a barrier as a matter of law. *Id.* at 778.

The plaintiff directs the Court's attention to *Talarico v. Bonham*, 650 A.2d 1192 (Pa. Commw. 1994), wherein the plaintiff lost control of her car while traveling in the proper lane, crossed over the oncoming lane, went off the road and hit a utility pole which was situated some 8 feet from the near edge of the roadway. Under these circumstances the Commonwealth Court reversed the grant of a non-suit and held that it could not be held as a matter of law that "PP&L should not have realized that the motorist might crash into the pole placed 8 feet from

the paved portion of the roadway, or that losing control of the car was so extraordinary that PP&L could not have foreseen it." *Id.* at 1196.

I find it a hollow exercise to attempt to reconcile these cases on the basis that the driver in *Talarico* used the road in its intended way whereas the driver in *Felli* did not. The issue is whether it is foreseeable that the roadside hazard or hazardous condition will impact on the actions of a driver using or traveling the roadway to which the hazard or hazardous condition is adjacent. In either case, viz *Talarico* where the driver left her lane and went left across the oncoming lane and into the pole 8 feet from the road's edge, or *Felli* where the driver left the road to the right and then re-entered and crossed over the oncoming lane and went down a steep embankment of the opposite side of the road, the result is the same, namely, the hazardous condition played a part in the infliction of injury on the motorist. To say that it turns on whether the driver used the roadway in its intended fashion solves no problem. It is no more an intended use to cross the oncoming lane in *Talarico* than it was in *Felli*. Likewise, why was *Talarico* any more foreseeable than *Felli*.

Given the foregoing analysis, I choose to follow the rationale suggested by *Talarico*. In the present action, the ditch and culvert head wall were 5 feet from the near edge of SR 209. The ditch posed a hazard to traffic in either direction. The head wall of the culvert did to some extent as well, however because the head wall faced south it posed a clear danger to anyone traveling north who happened to hit it. It was foreseeable that a vehicle

could hit the ditch and head wall regardless of the circumstances under which it lost control.

Even subscribing to the government's analysis, the *Talarico* decision seems most applicable. The government argues that *Felli* and *Talarico* are consistent on the basis that *Felli* turned on the absence of a legal duty owed by the government to a driver to eliminate potentially hazardous conditions adjacent to the opposite side of the roadway, whereas *Talarico* turned on the Pennsylvania law that utility companies are liable for harm caused by the negligent placement and maintenance of utility poles. It strikes the Court that the placement and maintenance of a hazardous condition, be it a utility pole or a ditch/culvert head wall, in close proximity to a roadway is the critical ingredient. Under *Felli*, a government is not expected to cure all natural roadside conditions or to guard against them. On the other hand, *Talarico* teaches that conditions which are artificially created bring with them responsibility to guard against their potential danger to motorists. Thus, I conclude the ditch/culvert head wall posed a hazard to motorists and the government had a duty to maintain the condition so as to minimize the danger or risk. There was credible testimony from Mr. Robson that the condition could have been rendered less hazardous, if not remedied, by a traversable inlet or grate. It is my view that this should have been done, and indeed this is compelled by the law of Pennsylvania as stated in *Talarico*.

The issue of comparative negligence of the plaintiff is in need of resolve. It is the Court's view that the plaintiff, under ideal conditions, should have stopped her vehicle in the grassy area adjacent to her travel lane. However,

since she did not know that the area was obstruction free when she found herself there, the contention that she was negligent in failing to stop the truck in that grassy area has no factual support. Plaintiff would have no way of knowing whether there was a ditch, drop-off, rocks or other obstructions in that area. It can also be said that under ideal conditions, the plaintiff should have slowed down and entered the highway in such a fashion as to enter and remain in her travel lane, and that failing to do so was negligent. Again, her lack of knowledge of the conditions in the grassy area do not permit the comfortable conclusion that she should have used the grassy area to slow down. To say that she failed to either stop or bring her vehicle under more control in the grassy area assumes her contemporaneous knowledge that the grassy area was free of obstructions. Furthermore, because she would be unaware of the conditions of the grassy area, it would be reasonable for her to have acted in such a way as to get out of that area as quickly as possible. Also, the fact that she experienced a drop-off when she left the roadway in the first instance provided reason to approach the re-entry in such a way as to eliminate any scrubbing effect a sharp drop-off (now a step-up) would have on her re-entry. The drop-off condition therefore contributed to the circumstances of her exit and re-entry. Given the circumstances, the further fragmentation of plaintiff's action to determine her negligence at various points from re-entry to crashing into the culvert head wall is not necessary. Given the circumstances of exit and re-entry and the conditions which I have noted as influencing her actions in this regard, the continuation across the road was a necessary

consequence of all that had preceded it. Accordingly, I do not find that the plaintiff was contributorily or comparatively negligent under the circumstances here presented.

I therefore arrive at the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On July 27, 1993 at about 7:30 p.m., plaintiff, Debbie Mitchell, operated her 1989 GMC pickup truck northbound on SR 209 within the Delaware Water Gap National Recreational Area in Lehman Township, Pike County, Pennsylvania.

2. State Route 209 is a two lane, two way, north-south oriented asphalt roadway under the jurisdiction of the National Park Service ("NPS"). The asphalt pavement is marked with a double yellow center line and white edge lines. The width between the edge lines is twenty-four (24') feet. The paved shoulder is one to two feet wide.

3. State Route 209 was originally designed, constructed and maintained by the Commonwealth of Pennsylvania.

4. State Route 209 was ceded by the Commonwealth of Pennsylvania to the NPS in 1983.

5. The posted speed limit at the entrance to the Recreation Area is 45 m.p.h.

6. Shortly after the intersection of SR 209 and Eshback Road, at or about marker 6.5

northbound on Route 209, plaintiff was caused to lose control of her vehicle, when a vehicle approaching from the opposite direction appeared to swerve into her lane.

7. The speed limit at this location was 45 m.p.h.

8. The plaintiff was carrying a load of wooden chairs in the cargo bed of her pickup truck.

9. At 7:30 p.m., on July 27, 1993, it was daylight and the weather was clear and dry.

10. At 7:30 p.m., on July 27, 1993, SR 209 in the area of question was clear and dry.

11. At the point where the plaintiff left SR 209, the pavement edge was approximately 4 1/4 inches higher than the immediately adjacent unpaved area.

12. While the land adjacent to the roadway was a grassy slope approximately 9 to 14 feet wide, which then flattened into a grassy field of 30 to 40 feet wide, the plaintiff had no way of knowing this was the condition of the area in which she found herself, nor was plaintiff in any position to know that this area was a clear zone.

13. Plaintiff's vehicle traveled along the grassy area adjacent to SR 209 for approximately 300 feet.

14. Plaintiff was able to regain only partial control of her vehicle, and as she attempted to steer her way back onto SR 209, she

found herself propelled diagonally across both the northbound and southbound lanes of SR 209.

15. The drop-off, or more accurately the step-up, where plaintiff re-entered SR 209 was level with the grassy area, however, plaintiff had no way of knowing that was the condition at that point.

16. Plaintiff then entered a ditch on the western shoulder of the south-bound lane of SR 209 and struck a stone and concrete head wall of the culvert at the north end of the ditch.

17. The ditch that plaintiff's vehicle went into on the west shoulder of the southbound highway is approximately 4 feet deep, 12 feet wide and 20 feet in length and runs parallel to the highway. The ditch terminates at a transverse culvert and the culvert's head wall. The roadside top edge of the ditch is approximately 5 feet from the western side of the pavement.

18. The ditch carries water from a driveway south of the culvert, and although initially shallow in depth, becomes steeper for the last 20 feet prior to the culvert head wall.

19. The impact of plaintiff's vehicle as it ran into the culvert head wall caused severe injuries to the plaintiff.

20. At some point beyond 300 feet North of the Eshback Boat Launch, plaintiff re-entered the paved roadway at an angle of approximately 20° from the direction of travel of the roadway.

21. Plaintiff re-entered the roadway at a speed no greater than 45 m.p.h.

22. The stone head wall was approximately 5 feet from the edge of the paved roadway.

23. The force of the impact of the vehicle with the head wall of the culvert caused a 24 inch deviation in the alignment of the left front of plaintiff's vehicle.

24. The force of impact caused the steering wheel to break off and the windshield to spider.

25. The culvert head wall and shoulder drop-off are roadside hazards that are within an area that should have been traversable and available for recovery after plaintiff's vehicle left the road.

26. The drainage ditch at the site of the accident is a hazard to vehicles because of its steep side slopes in proximity to the edge of the pavement.

27. The hazards created by the steep slope of the ditch and the head wall could have been eliminated by a shallow ditch with traversable slopes and a grated inlet, or by a traversable inlet.

28. The drop-off/step-up existed as a result of resurfacing and improper maintenance. The drop-off/step-up was a dangerous condition.

29. At the scene of the accident plaintiff remained trapped in the vehicle for approximately 30 minutes.

30. The jaws of life were used to extricate plaintiff from the wreckage.

31. Plaintiff was initially observed trapped in the vehicle with her left leg pinned under the seat; the fracture of her left femur was visible.

32. The plaintiff's vehicle had extensive damage to the driver's side with the dash and steering wheel pushed toward the seat and the end of the steering wheel snapped off.

33. The plaintiff's left leg was pinned behind her between the door and the seat frame.

34. Upon her arrival at Lehigh Valley Hospital, plaintiff was examined and diagnosed as suffering from the following:

    A. fracture of the left femur (comminuted fracture of the mid-shaft of the femur with displacement of fracture fragments);

    B. Fracture of the right tibia and fibula (comminuted fracture of the medial and lateral malleoli with displacement of fracture fragments and dislocation of the ankle joint); and,

    C. massive facial lacerations.

35. Medical personnel wished to perform a CT scan of the plaintiff's head at the time of arrival, but because the anesthesia personnel had difficulty in securing an airway, they were reluctant to agree to this. Accordingly, an elective tracheotomy was performed in order to permit the taking of the CT scan (which was negative).

36. A chest x-ray on July 28, 1993, revealed a right, pulmonary contusion and a fracture of the left, second rib.

37. Examination of the face revealed a large, flap-type of laceration involving the left lower lip and the chin area; the face revealed a large laceration of the left zygomatic area (cheek and eye socket bones); the upper jaw was determined to be free-floating, indicative of a LaForte type of fracture. On August 28, 1993, Walter J. Okunski, M.D. prepared a consultation report describing the facial injuries as well as drawing a picture of same.

38. Examination of the left, lower extremity also revealed an external rotation deformity consistent with a pelvic or hip fracture.

39. Plaintiff's speech was difficult to understand, secondary to extensive facial injuries.

40. On the evening of her admission, she was taken to surgery at which time irrigation and debridement of the facial lacerations with preliminary closure was performed as well as repair of the left femur fracture by way of open reduction, internal fixation.

41. Radiographic studies of the facial bones revealed various comminuted fractures of and in the vicinity of the left orbit, the zygomatic arch (cheek and eye socket bones), the right orbit, the nose, and a questionable fracture of the left mandibular

condyle (the joint where the rear jaw and temporal bones meet).

42. The facial injuries were described in the discharge summary dated September 9, 1993, as follows:

    A. complex, star-shaped, jagged laceration at the area of the left zygoma;

    B. a laceration of the corner of the mouth on the left side of the face extending up into the nasolabial arca (between nose and lip) extending through the intra-oral cavity;

    C. a large, lip avulsion laceration of the lower lip with lower lip hanging on a lateral pedicle (side jaw muscle).

43. On August 3, 1993, Dr. Okunski, plastic surgeon, performed further repair of the facial injuries as follows:

    A. internal fixation and alignment of the zygomatic process of the frontal bone and temporal process of the zygomatic bones with an intervening bone fragment, using a ten-hole miniplate across the two fragments and 1.5 mm screws (stabilizing the zygomatic arch);

    B. reconstruction of the orbital floor with titanium meshed synthes microplate using 5 mm fixation screws;

    C. external stabilization of the nasal fracture.

44. On August 3, 1993, plaintiff underwent surgery to repair, by way of closed reduction, a complex fracture of the maxilla (upper

jaw bone) as well as a maxillo-mandibular (upper and lower jaws) fixation involving the application of arch bars to secure and stabilize the zygomatic arch (cheek and eye socket bones). Noted during the course of the procedure were avulsion of one tooth and fractures of four other teeth.

45. On October 14, 1993, in follow-up treatment with an ophthalmologist (Lehigh Valley Ophthalmic Associates, Inc.), plaintiff was subjected to an intravenous, fluorescein angiogram (imaging with dye contrast) in order to rule out a sub-retinal neurovascular membrane (scarring) of the left eye because of continued blurry vision.

46. On November 1, 1993, Dr. Okunski noted that the plaintiff had excess prominence of the left zygoma (cheek and eye socket bones) and also prominence of the left, infra-orbital region (swellng within the left eye socket), and enopthalmos (abnormal receding of the eyeball in the socket.)

47. On December 1, 1993, Dr. Okunski concluded that plaintiff needed post-traumatic rhinoplasty (reconstructive nose surgery), observing that the nose was over toward the left side and that this was causing an airway obstruction; he also noted that plaintiff had an enopthalmos (abnormal receding of the eyeball in the socket) of the left orbit and that she would benefit from a calvarial bone (the part of the cranium above the eyes, ears and occipital protuberance) graft replaced into the area. He further noted a lack of symmetry of the left, anterior zygoma (cheek and eye socket

bones) and the left arch which the doctor believed needed to be reset. Dr. Okunski also opined that the malleolar (either of the two rounded bones on either side of the ankle joint/at the inner side of the lower end of the tibia) bone needed to be grafted.

48. On January 25, 1994, Dr. Okunski proceeded with post-traumatic rhinoplasty (reconstructive surgery of the nose) and the bone graft. This included bone graft to the left zygoma and insertion of an implant to the floor of the left orbit. The doctor also repositioned the left zygomatic arch.

49. On February 3, 1994, Dr. Okunski removed the sutures from the left side of plaintiff's face. The doctor noted that there was still a significant amount of deformity with the left eye although it was significantly improved over what it had been.

50. Plaintiff attended physical therapy every two to three days for a total of ten visits. On December 8, 1993, plaintiff's physical therapy at Mercy Community was terminated so that she could undergo facial surgery and remain with relatives in Maryland for recuperation. She was noted at that time of discharge as ambulating independently, using a regular cane. She had no complaint of pain in either the right ankle or the left leg.

51. In November, 1994, plaintiff underwent further facial reconstructive surgery at Johns Hopkins University Hospital where she was noted as presenting with ophthalmos (eye inflammation) and bone

resorption (deterioration) secondary to trauma.

52. The surgery generally consisted of a left, orbital reconstruction, a left zygomatic reconstruction, and a nasal dorsal (rear nose) reconstruction. These surgeries were performed by both Nicholas Iliff, M.D., an ophthalmologic surgeon, and Paul N. Manson, M.D., a plastic surgeon.

53. Dr. Iliff performed the orbital surgery. In this procedure, he determined that despite fixation in the prior surgery, the infra-orbital rim was "quite mobile". He therefore removed the previously implanted silicone and the titanium plate. Dr. Iliff also performed substantial dissection in order to free up various soft tissue bodies which had become adherent (hardened) due to scar tissue. Dr. Iliff fashioned a new titanium plate to fit the orbital floor to improve the horizontal level of the globe and the prominence of the globe. During the course of his dissection, Dr. Iliff also found two foreign bodies that appeared to be stone-like and dating back to the patient's original injury. In reconstructing the infra-orbital rim, the doctors detected a "tremendous bone deficit" and therefore had to harvest bone from the ribs for grafting purposes in addition to preparing orbital floor plate, the surgeons also constructed a lateral, orbital wall plate. Additional pieces of bone and cartilage were used to reconstruct various pieces of bony architecture surrounding the left eye and affixed with titanium screws.

54. On July 28, 1995, plaintiff underwent further, facial reconstructive surgery at Johns Hopkins Hospital. This surgery including [sic] the following:

    (A) revisions of the tracheotomy scar;

    (B) harvesting of fat and fat material from the left thigh and placed in the left, infra-orbital region;

    (C) fat was taken from the left thigh and injected into the chin and cheek scars;

    (D) the left zygomaticofrontal (front under-eye bone) was opened and a plate removed;

    (E) reconstruction of the dorsal nasal (rear nose) bone area including the augmentation of the nasal roof area with a piece of cartilage that was thinned, crushed, and then inserted. The surgery was performed by Dr. Manson.

55. After the surgery, plaintiff experienced nausea and vomiting in the recovery room. She was admitted for overnight observation, IV hydration and control of her pain.

56. On March 12, 1996, plaintiff underwent further surgery at Johns Hopkins Hospital by Elba M. Pacheco, M.D. This was to correct recurrent esotropia (one eye is cockeyed while the other is looking upward as the other is focusing on an object) and incompetent, left hypertropia (one eye is looking upward as the other focusing on an object) following recent trauma. This surgery involved relocation of the left medial rectus

muscle (muscle which adjusts eye vertically) and a resection of the left, lateral rectus (eye muscle which adjusts eye horizontially [sic]). He also performed a left inferior, oblique and myectomy (excision of muscle).

57. On or about April 8, 1994, Susan B. Bressler, M.D., an ophthalmologist, examined plaintiff at the request of Dr. Iliff for evaluation of macular (controls peripheral vision) findings in the left eye. She noted that another ophthalmologist had examined plaintiff in 1993 for unexplained metamorphopsia (visual distortion) that developed immediately following the accident. As a result of her exam, Dr. Bressler opined that plaintiff had a pigmentary (colored spot) abnormality in the superior fovea of the left eye as well as the infero temporal slightly posterior equatorial region (rear eye) which she attributed to her "substantial past trauma." Dr. Bressler further opined that the plaintiff was at increased risk of developing a retinal detachment in the future because of the past, substantial trauma, and the doctor could not rule out the possibility of choroidal neovascularization (chronic blood-shot eyes) from one of these sites.

58. On May 31, 1995, Dr. Bressler performed a follow-up evaluation wherein her findings were essentially similar to those for a previous examination. She did conclude, however, with a notation that plaintiff was suffering from "progressive optic atrophy" in the left, eye which is "compatible with

the optic nerve trauma we presume was present previously, likely related to her accident".

59. On or about July 18, 1995, ophthalmologist Dr. Pacheco examined plaintiff and diagnosed her as suffering from post-traumatic strabismus (crossed eyes) and recommended "three muscle surgery on adjustable sutures" but proposed deference of such surgery until after she finished her other reconstructive surgery.

60. In February, 1994, plaintiff sought correction of her dental injuries with Francis V. Simansky, D.D.S. of Belair, Maryland. He installed a bridge for the upper, front teeth (numbers 8, 9 and 10) and placed crowns on three other teeth in the upper front (numbers 6, 7, 11 and 12). These procedures were performed from February 1994 through June 1994.

61. In August 1996, plaintiff came under the care of John W. Siebert, M.D., a plastic surgeon at New York Medical Center. On August 15, 1996, the doctor operated on plaintiff and performed the following:

    A. Removed the easily palpable, large plates and screws from the infero-orbital rim and anterior orbital floor;

    B. A re-contouring and reconstruction of the peri-orbital area (around the eye socket) accomplished by a microvascular free tissue transfer involving the removal of tissue from the cheek including the plaintiff's circumflex scapular artery (to provide blood

flow); this piece of tissue was then placed into an incision on the left side of the face at which point the surgeon, using an operating microscope, attached the circumflex scapular (shoulder) artery and the superficial temporal artery (from the forehead) as well as accompanying veins, to achieve both arterial and venous anastamosis (connection).

62. Revisions of this procedure was [sic] conducted on January 7, 1997.

63. Plaintiff also underwent an additional revision surgery of this procedure on December 18, 1997.

64. The Institute of Reconstructive Plastic Surgery of New York University Medical Center has recommended that plaintiff undergo the following reconstructive surgical procedures:

    A. enophthalmus (eyeball receding into socket) repair;

    B. alloplastic augmentation of the orbital floor and rim (plastic surgery of the interior of the eye socket); and,

    C. lateral canthalplexy (plastic surgery of the corners of the eyelid).

65. On or about September 28, 1993, in accordance with observations of her orthopedic surgeon, David Sussman, M.D., plaintiff was able to begin partial weight bearing with a walker and physical therapy.

66. On November 8, 1993, plaintiff began physical therapy at Mercy Community Hospital

in Port Jervis, New York for the fracture of her left femur and right ankle. She was noted to have been in a non-weight bearing status for both legs for the first two months. During the third month, she had been ambulating independently, using a regular cane. She had no complaint of pain in either the right ankle or the left leg.

67. Between November 1994 and October 1995, plaintiff treated with Milan Joshi, M.D., a psychiatrist, who diagnosed the plaintiff as suffering from major depression and prescribed Nortriptyline (20 mg/day). Debbie Mitchell is still taking the same drug and the same dosage at the present time.

68. In March 1996, plaintiff sought therapy at the Counseling Center at Franklin Square, Adult Out-Patient Psychiatric Program. There she came under the care of Sheldon M. Timin, LCSW-C, ACSW, a senior clinical social worker. Mr. Timin diagnosed the plaintiff as suffering from major depression and post-traumatic stress disorder. He established as short-term goals, the reduction of anxiety and depression. His long-term goals were for the patient to learn to accept her personal appearance and to resume driving with confidence by herself.

69. During the intake interview, Mr. Timin noted that the patient reported depression, inability to go out and socialize and get on with her life, and altered body image and low self esteem due to the motor vehicle accident of July 1993. The report also notes that prior to the accident, the patient had been dating a man named Michael and that

there had been discussions about living together and getting married. Since the accident, while they have remained friendly, they are no longer intimate and no longer talk about marriage or living together.

70. The patient was reported as currently living with her mother and her older sister and the sister's family.

71. Mr. Timin treated the patient through February 1997. During that time, he noted the following:

A. In April 1996, she had difficulty in going to a recreation center because she had to pass a wall of mirrors in the exercise area;

B. In September 1996, the patient was reported as having returned to comfortable driving; her stated next goal was to get back to see old friends that she has avoided since the accident because of feeling self-conscious about her appearance;

C. The patient was observed as having left asymmetry on the left side of her face as the result of surgery in August 1996 (Dr. Seibert). The patient was described as being distraught at the time since the August surgery was supposed to be the first of two phases but that because of monetary problems, on her part, the surgeon was refusing to proceed with the second, corrective phase of the surgery. Patient was described as being panicked

because of the thought that she would be stuck in the middle of the procedure. The therapist also noted that she was still driving without problem, she had been secluding herself secondary to facial appearance; and,

D. On February 27, 1997, the therapist noted that the patient had had further reconstructive, facial surgery on January 7, 1997, and was pleased with the outcome. He himself observed that the face appeared much more symmetrical. However, he noted, the patient was still struggling with her altered appearance and accepting the fact that her face was different. In terms of getting out in public, some progress has been made by the patient's attending church.

72. Following each of her twenty (20) surgeries, and to date, plaintiff has attempted to recuperate at her home. She has suffered and endured severe physical and psychological pain, hardship, disfigurement, and humiliation, all of which are permanent in nature.

73. Plaintiff's medical bills as of the time of trial totaled $242,269.86.

74. Based upon the medical records, reports, photographs and testimony by plaintiff and her witnesses, plaintiff has been permanently injured and disfigured as the direct an proximate result of this accident.

CONCLUSIONS OF LAW

1. Plaintiff brought this claim against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2761 *et seq.* Pursuant thereto, the United States may be held liable to plaintiff for the injuries she sustained in the motor vehicle accident.

2. State Route 209 within the Delaware Water Gap National Recreational Area was under control of the NPS at the time of this accident.

3. The NPS was required to maintain the highway in a safe condition free of roadside hazards.

4. The NPS should have been aware of the danger posed by the drop off/step-up and the steep slope of the drainage ditch near the culvert head wall and the culvert head wall in close proximity (5 feet to the edge of the roadway).

5. The failure of the NPS to correct these conditions was negligent.

6. The drop-off where the plaintiff went off the eastern side of the road was a substantial factor in bringing about the accident and her injuries, both because it existed where it did when she left the road and because the plaintiff had not way of knowing the same, greater or less where she reentered the road.

7. The steepness of the ditch on the western side of the road was a substantial factor in

bringing bout the accident and the plaintiff's injuries.

8. The absence of a traversable inlet covering the culvert/head wall area was a substantial factor in bringing about the accident and the plaintiff's injuries.

9. The plaintiff was not comparatively negligent in causing her injuries.

10. The defendant is liable to plaintiff in the amount of $1,250,000.00

Date: March 12, 1999

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DEBBIE MITCHELL,	:	
Plaintiff	:	
	:	CIVIL ACTION NO.
vs.	:	3:CV-96-0897
UNITED STATES OF AMERICA,	:	(JUDGE CAPUTO)
Defendant	:	

ORDER

(Filed March 12, 1999)

NOW, this 12th day of March, 1999, it is hereby ORDERED that:

1. Judgment is entered in favor of the plaintiff and against the defendant in the amount of $1,250,000.00.

2. The Clerk of the Clerk [sic] shall enter judgment and mark this case closed.

/s/ A. Richard Caputo
A. Richard Caputo
United States Disrict Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3357

DEBBIE MITCHELL

v.

UNITED STATES OF AMERICA,

Appellant

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO FUENTES, and ALDISERT*

The petition for rehearing filed by

Appellee Debbie Mitchell

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

---

*Hon. Ruggerio J. Aldisert, Senior Circuit Judge, as to panel rehearing only.

having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: OCT 25 2000

SMACCTO: JC, MF, RG, DH

FILED
MAR 26 2001
CLERK

(2)

No. 00-1188

In the Supreme Court of the United States

DEBBIE MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
STUART E. SCHIFFER
Acting Assistant Attorney General
ROBERT S. GREENSPAN
DOUGLAS HALLWARD-DRIEMEIER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

27 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that the federal government's decision regarding the proper allocation of resources between reconstructing a state-designed park road and building an alternate route for commercial traffic was protected by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Baum v. *United States*, 986 F.2d 176 (4th Cir. 1993)	6
Berkovitz v. *United States*, 486 U.S. 531 (1988)	6
Cestonaro v. *United States*, 211 F.3d 749 (3d Cir. 2000)	8
Cope v. *Scott*, 45 F.3d 445 (D.C. Cir. 1995)	6, 7
Reeves v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000)	9
United States v. *Gaubert*, 499 U.S. 315 (1991)	6
United States v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984)	6
Wisniewski v. *United States*, 353 U.S. 901 (1957)	8

Statutes:

Federal Tort Claims Act:	
28 U.S.C. 1346(b) (1994 & Supp. IV 1998)	5
28 U.S.C. 2671 *et seq.*	2
28 U.S.C. 2674	5
28 U.S.C. 2680(a)	3, 5
Supplemental Appropriations Act, 1983, Pub. L. No. 98-63, Tit. I, 97 Stat. 328-329	2

In the Supreme Court of the United States

No. 00-1188

DEBBIE MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 225 F.3d 361. The opinions and orders of the district court (Pet. App. 16-42; App., *infra*, 1a-14a) are unreported.*

JURISDICTION

The judgment of the court of appeals (Pet. App. 14-15) was entered on August 28, 2000. A petition for rehearing was denied on October 25, 2000 (Pet. App. 43-44). The petition for a writ of certiorari was filed on January 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

* An earlier memorandum and order of the district court dated June 4, 1998 is appended to this brief and is unreported.

STATEMENT

This is a tort action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, arising out of an automobile accident along Route 209, which runs through the Delaware Water Gap National Recreation Area (Recreation Area), a unit of the National Park System. Petitioner sustained injuries when, to avoid an oncoming car, she drove off Route 209, proceeded for over 300 feet through a grassy clear zone located to the right of the road, crossed back over both lanes of traffic and crashed into a ditch on the opposite side of the road. Pet. App. 4-6.

1. Route 209, the road on which petitioner's accident occurred, was designed, built and maintained by the Commonwealth of Pennsylvania. Pet. App. 4. In 1983, the Commonwealth ceded Route 209 to the United States as part of the Recreation Area. *Ibid.* Since receiving Route 209 from Pennsylvania, the United States' policy has been to convert Route 209 from a commercial through-road to a scenic parkway used only in connection with the Recreation Area itself. *Id.* at 4, 11. In 1983, Congress closed Route 209 to non-local commercial traffic and provided funding for construction of a bypass, which Congress explicitly intended as an alternative to Route 209 for through traffic. *Id.* at 4; Supplemental Appropriations Act, 1983, Pub. L. No. 98-63, Tit. I, 97 Stat. 328-329.

Congress has not appropriated sufficient funds to rebuild Route 209 completely, and, as a result, the Park Service has had to prioritize among work items. Pet. App. 4, 11-12. A 1986 engineering study of the Recreation Area's roads identified numerous bridges requiring reconstruction and the need to repave most roads within ten years. *Id.* at 5, 11. The study also found that

there were obstructions such as culvert head walls within the desired clear zone along the road, including some within one or two feet of the pavement. *Id.* at 11-12. According to a 1992 traffic safety report, the area of Route 209 where petitioners accident occurred was not a high hazard area. *Id.* at 5. In light of these findings, the Park Service prioritized the rebuilding of deteriorating bridges and the elimination of those obstructions that were closest to the road. *Id.* at 12.

2. On July 27, 1993, petitioner was driving a pick-up truck northbound along Route 209 when she saw what appeared to be an oncoming car in her travel lane. Pet. App. 5. To avoid the car, petitioner swerved to the right, exiting the road into a grassy "clear zone" approximately 40-50 feet in width. *Ibid.* Petitioner traveled in excess of 300 feet in this clear zone, *ibid.*, but "made no attempt to stop while traveling across the grassy area." *Id.* at 17. While attempting to reenter the roadway at a speed "no greater than 45 MPH.," plaintiff drove across both lanes of traffic and off the opposite side of the road, crashing into a drainage ditch and culvert head wall located approximately five feet off the road. *Id.* at 5-6.

3. Petitioner brought suit under the FTCA alleging that the Park Service had negligently failed to eliminate dangerous conditions that existed along Route 209. The United States moved for summary judgment on the ground that petitioner's claim fell within the discretionary function exception to the FTCA's waiver of immunity, 28 U.S.C. 2680(a). Specifically, the United States argued that decisions regarding the allocation of funds between reconstruction of Route 209 and construction of a new bypass, and prioritization among safety improvements to Route 209 after receiving it

from Pennsylvania, were exercises of discretion involving policy considerations.

The district court held that the discretionary function exception did not apply. App., *infra*, 12a. The district court agreed with the United States that there was no federal statute, regulation or policy that mandated a particular design or safety features for the Park Service road. *Id.* at 8a-9a. The court nonetheless rejected the government's discretionary function argument because, in the court's view, the Park Service's challenged conduct "did not reflect the exercise of judgment grounded in social, economic or political policy." *Id.* at 12a.

After trial, the district court found that the Park Service was negligent in failing to improve the condition of Route 209 where petitioner's accident occurred and that the Park Service's negligence was a substantial factor in causing petitioner's injuries. The court held that the Park Service should have repaved the shoulder at the point petitioner's truck left the road and should have covered the ditch and culvert head-wall with a "traversable inlet." Pet. App. 40-41. The court rejected the United States' arguments that, as a matter of Pennsylvania law, petitioner's failure even to attempt to slow her vehicle in the grassy area provided as a recovery zone was unforeseeable and constituted the proximate cause of her accident. *Id.* at 19-23.

4. The court of appeals reversed. Pet. App. 1-13. The appeals court first agreed with the district court's conclusion that there was no regulation or other legal requirement that mandated a particular course of conduct by the Park Service with respect to renovating Route 209. *Id.* at 7-8. The court then concluded that the government's decision how to allocate limited funds between the new bypass and reconstruction of Route

209 and among the numerous renovation projects along Route 209 was a decision that involved the weighing of social, economic and political policy. *Id.* at 8, 11-13. The court of appeals rejected petitioner's attempt to focus in isolation on the question whether to repave the shoulder and reconstruct the ditch and culvert at the precise location of petitioner's accident. Rather, the court viewed the decision whether to renovate the particular stretch of road at issue within the context of larger decisions: (1) to reduce the road's usage to recreational traffic by rerouting commercial traffic, and (2) to focus, in light of inadequate funds to rebuild the road completely, on a few high-priority projects instead of a larger number of less costly repairs. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, the petition for a writ of certiorari should be denied.

1. a. The FTCA is a limited waiver of sovereign immunity for certain tort actions against the United States. See 28 U.S.C. 1346(b) (1994 & Supp. V 1998); 28 U.S.C. 2674. A principal limitation on that waiver of immunity is the discretionary function exception, which immunizes the United States from tort liability for discretionary policy choices made by its employees. Under that exception, courts may not hold the United States liable for "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a).

An action is protected by the exception if (1) "it involves an element of judgment or choice," and (2) the judgment "is of the kind that the discretionary function exception was designed to shield." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). The first step of the inquiry focuses on whether a "federal statute, regulation, or policy specifically prescribes a course of action" as to the decision at issue. *Ibid.* The second step of the inquiry focuses "on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991); see also *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (exception prevents "judicial 'second-guessing'" of decisions "grounded in social, economic, and political policy").

b. The court of appeals' holding that petitioner's claim is barred by the discretionary function exception is correct and wholly consistent with the decisions of the two other circuits that have considered the application of the discretionary function exception to similar facts. See *Cope* v. *Scott*, 45 F.3d 445 (D.C. Cir. 1995); *Baum* v. *United States*, 986 F.2d 716 (4th Cir. 1993). In each case, the court of appeals has held that the discretionary function exception precludes judicial second-guessing of major road renovation projects in our national parks.

In *Cope*, the District of Columbia Circuit held that the Park Service's decision not to repave a particular stretch of the Rock Creek Parkway was protected because the Park Service was required to "balanc[e] factors such as Beach Drive's overall purpose, the allocation of funds among significant project demands, the safety of drivers and other park visitors, and the inconvenience of repairs as compared to the risk of

safety hazards." 45 F.3d at 451. The Park Service had placed the stretch of road in question "in the middle of a priority list of work that needed to be done on eighty different sections of park roads." *Ibid.*

Likewise, in this case, the Third Circuit held that petitioner's suit implicated the balancing of policy considerations such as the "overall purpose" of Route 209 as a recreational park road, rather than a commercial through-road, the "allocation of funds" between repairs to Route 209 and an alternate commercial bypass as well as among significant safety projects, including the reconstruction of deteriorating bridges and removal of those obstacles that posed the greatest danger to park visitors. See Pet. App. 8, 10-12.

In *Baum*, the Fourth Circuit held the Park Service's decision not to replace cast iron guard rails with ones made of cast steel was a protected exercise of the Park Service's discretion. 986 F.2d at 722. The Fourth Circuit rejected the claimant's attempt to limit the court's inquiry to whether the Park Service should have replaced the guard rail at the particular overpass where the petitioner was injured. Rather, the court recognized that replacement of the particular guard rail would have been part of a larger renovation of all the similar guardrails along the highway. *Id.* at 723-724. The Third Circuit similarly held in this case that "[t]he Park Service had to balance the costs of the repairs *of every culvert head-wall along Route 209*," Pet. App. 12 (emphasis added), against other safety concerns, and all of this within the light of "larger policy decisions" regarding the road's proper usage. *Id.* at 11-12.

Rather than reflecting conflict among the courts of appeals, the Third Circuit's decision in this case is entirely consistent with those of other circuits involving similar facts. Because there is no disagreement among

the circuits, there is no reason for this Court to review the Third Circuit's highly fact-bound decision in this case.

2. Petitioner does not squarely challenge the court of appeals' ultimate holding that the discretionary function exception protects the government's challenged conduct. Rather, petitioner asks this Court to decide which party bears the burden of establishing whether a claim falls within the discretionary function exception to the FTCA. That question, however, is not presented by the court of appeals' decision in this case.

As the petition acknowledges, the court of appeals did not address the question in its opinion in this case. Pet. 3-4. Moreover, as petitioner concedes, Pet. 10, the Third Circuit has already adopted the position that petitioner advocates. In *Cestonaro* v. *United States*, 211 F.3d 749 (2000), the Third Circuit held that the government has the burden of proving that the discretionary function exception applies. *Id.* at 756 n.5. There is no indication that the panel in this case disregarded the prior panel's holding on this point.

Petitioner maintains that, sub silentio, the court of appeals must have ignored prior circuit precedent and placed the burden on petitioner because, in petitioner's view, the "panel accorded the government the benefit of every possible favorable inference that could be teased out of the [Park Service supervisor's] superficial affidavit." Pet. 3. Petitioner offers no support for this conclusory assertion. Moreover, even if (contrary to fact) petitioner were correct, a decision that silently deviates from explicit circuit precedent would at most present an intracircuit conflict that is matter for the court of appeals, rather than this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

In asserting that the court of appeals' decision is unsupported by the evidence, petitioner refers exclusively to the affidavit and attachments that the government submitted in support of its motion as if those materials were the only evidence in the record. See Pet. 3. Petitioner ignores the additional evidence submitted by petitioner herself in opposition to the government's motion (such as the 1986 safety study). Petitioner seems to suggest that the court of appeals was somehow precluded from relying upon that evidence to rule in the government's favor. It is well established, however, that a court must consider all the evidence when ruling on a motion for summary judgment, not just the material submitted by the moving party. See, *e.g.*, *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (in ruling on summary judgment motion, "the court must review the record taken as a whole" (internal quotation marks omitted)). The evidence, when viewed in its entirety, supports the decision below.

Finally, there is no indication in the court of appeals' decision that the panel viewed the application of the discretionary function doctrine to this case as a close question. As a consequence, the panel had no need to address the allocation of burdens of proof in its opinion because the outcome of the case did not turn upon that question. Because the question on which petitioner seeks certiorari was not material to the panel's resolution of the case, this Court's consideration of that question in this case would be inappropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

STUART E. SCHIFFER
Acting Assistant Attorney General

ROBERT S. GREENSPAN
DOUGLAS HALLWARD-DRIEMEIER
Attorneys

MARCH 2001

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

No. 3:CV-96-0897
(Judge Caputo)

DEBBIE MITCHELL, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: June 4, 1998]

MEMORANDUM

Before the court are the motion to bifurcate trial and the motion for summary judgment of the defendant, United States of America. For the reasons which follow, the motion for summary judgment will be denied and the motion to bifurcate will be denied.

BACKGROUND

Plaintiff, Debbie Mitchell, filed a complaint in the instant action in the United States District Court for the Eastern District of Pennsylvania on March 27, 1996. The basis of plaintiff's claim is injuries which she sustained in a motor vehicle accident on July 27, 1993 while traveling on Route 209 in the Delaware Water Gap National Park. The plaintiff alleges negligence by

the defendant in the design and maintenance of the roadway. The action was brought pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §2671, *et seq.* On May 6, 1996, the action was transferred to the United States District Court for the Middle District of Pennsylvania.

On August 20, 1996, the United States filed an answer to the complaint raising affirmative defenses. On August 28, 1997, the United States filed a motion to bifurcate trial as to liability and damages issues. On September 15, 1997, the United States filed a motion for summary judgment. The appropriate briefs have been filed by the parties and the motions are ripe for disposition.

DISCUSSION

Summary judgment is appropriate only when there is no genuine issue of material fact to be resolved. Fed. R. Civ. P. 56; *Peterson v. Lehigh Valley Dist. Council*, 676 F.2d. 81, 84 (3d Cir. 1982); *Continental Ins. v. Bodie*, 682 F.2d 436, 438 (3d Cir. 1982). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. The entire record must be examined in light most favorable to the non-moving party. *Continental Ins., supra.* Additionally, the Supreme Court has ruled that Fed. R. Civ. P. 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), *cert. denied* 484 U.S. 1066 (1988). The Court further stated that "Rule 56(e) . . . requires the non-

moving party to go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324.

In support of its motion for summary judgment, the United States argues that the National Park Service's maintenance of Route 209 in the Delaware Water Gap National Recreation Area entailed the exercise of a discretionary function which precludes actions for damages against the United States pursuant to 28 U.S.C. §2680(a). In addition, the United States argues that the National Park Service did not owe plaintiff any duty of care to install a guardrail, when, without fault of the United States, plaintiff's vehicle crossed both lanes of Route 209 and came to rest on a culvert on the opposite side of the road.

In support of its motion for summary judgment, the United States filed the declaration of Mark Spadea, a Civil Engineer with the United States Department of Interior, National Park Service, the Park Road Standards for the National Park Service dated 1984, a map of the Delaware Water Gap area, statutes relating to the Delaware Water Gap, and an excerpt of the deposition of plaintiff describing the circumstances of the accident.[1]

In opposition to the motion for summary judgment, the plaintiff argues that the negligent conduct of the National Park Service was not entitled to protection under the discretionary function doctrine. In addition, plaintiff argues that the failure of the National Park Service to repair the drop-off at the edge of the road-

---

[1] *See* Document 25, Exhibits 1-3.

way, to create a traversable inlet or to post a sign was not the type of conduct the FTCA was designed to protect. Rather, says plaintiff, it amounts to nothing more than garden variety negligence, and involves safety considerations under established National Park Service policy. Finally, plaintiff argues that she has set forth a viable claim under Pennsylvania law. In opposition to the motion for summary judgment, the plaintiff has submitted excerpts of plaintiff s deposition regarding how the accident occurred, an Engineer's Report prepared by Lance E. Robson, P.E. addressing the plaintiff's accident and the area in which the accident occurred, excerpts of the deposition of Robert F. Geis, a Design Scoping Report prepared by the Department of Transportation for the Delaware Water Gap National Recreation Area prepared in April 1995, an Engineering Study of the Delaware Water Gap National Recreation Area prepared for the National Park Service by the Federal Highway Administration dated August 15,1986, and a newspaper article from the Philadelphia Inquirer dated October 8, 1997 regarding an outhouse at the Delaware Water Gap.[2]

The discretionary function exception to the FTCA, 28 U.S.C. §2680(a), provides in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or *based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty*

---

[2] *See* Document 31, Exhibits A-F.

> *the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.* (emphasis added).

The discretionary function has been addressed by the United States Supreme Court in *United States v. Gaubert*, 499 U.S. 315 (1991). In *Gaubert*, the Supreme Court held that the discretionary function exception bars claims predicated upon acts or omissions that involved the exercise of discretion in furtherance of public policy goals. In particular, the Court stated:

> The exception covers only acts that are discretionary in nature, acts that "involv[e] an element of judgment or choice." *Berkovitz, supra*, at 536, 108 S.Ct., at 1958; see also *Dalehite v. United States*, 346 U.S. 15, 34, 73 S. Ct. 956, 967, 97 L.Ed. 1427 (1953); and "it is the nature of the conduct, rather than the status of the actor" that governs whether the exception applies. *Varig Airlines, supra*, at 813, 104 S. Ct., at 2764. The requirement of judgment or choice is not satisfied if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because "the employee has no rightful option but to adhere to the directive." *Berkovitz*, 486 U.S., at 536, 108 S. Ct., at 1958-1959.
>
> Furthermore, even "assuming the challenged conduct involves an element of judgment," it remains to be decided "whether that judgment is of the land that the discretionary function exception was designed to shield." *Ibid.* See *Varig Airlines*, 467 U.S., at 813, 104 S. Ct., at 2764. Because the purpose of the exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy

> through the medium of an action in tort," *id.*, at 814, 104 S. Ct., at 2765, when properly construed, the exception "protects only governmental actions and decisions based on considerations of public policy." *Berkovitz, supra*, at 537, 108 S. Ct., at 1959.

United States v. Gaubert, 499 U.S. 316, 322-23.

The United States Court of Appeals for the Third Circuit recently addressed the discretionary function exception in *Gotha v. United States*, 115 F.3d 176 (3d Cir. 1997). In *Gotha*, the court found that plaintiff's claim that she fell on a footpath leading to a structure under the control of the United States Navy and that the Navy failed to provide routine safeguards on the footpath did not implicate the discretionary function exception to the FTCA.

As the Court pointed out citing to *Berkovitz v. United States*, 486 U.S. 531 (1988), a two-stage inquiry is utilized. First, a court must consider if a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow. If one does, the employee has no rightful option but to adhere to the directive and there can be no lawful discretionary act. However, if circumstances imposing compulsion do not exist, the court must consider whether the challenged action or inaction is of the kind the discretionary function exception was designed to shield, keeping in mind that the discretionary function exception insulates the government from liability if the action involves the permissible exercise of policy judgment. *Gotha v. United States*, 115 F.3d 176, 179 (1997).

We agree with the plaintiff that the situation in *Gotha* is instructive in deciding the instant action. In *Gotha*, the plaintiff's complaint focused on the lack of a

stairway, railing and lighting that made the step path an unsafe means of access to the trailer in the lower lot. In addressing the evidence presented, the court was unable to conclude whether there was an actual decision to forego the measures or whether there was simply inaction. The court held that the action or inaction went more to the issue of negligence rather than whether the issue of policy discretion was implicated. Specifically, the court agreed with the district court that there was no government regulation directing the agency's conduct and that there was no delegation of responsibility to an independent contractor. However, the court found that the district court was incorrect in concluding that policy considerations were present in the Navy's action or inaction. The court disallowed the affidavit presented by the Navy which stated that in evaluating a decision of whether to install an outdoor staircase and artificial lighting there are military, social and economic considerations as being of such general application as to provide no assistance in determining whether the discretionary function exception existed. The court concluded that the challenged actions were not the kind of conduct that can be said to be grounded in the policies applicable to the Navy's mission. Thus, the court held that the discretionary function exception was not applicable to the action.

The first issue which this court must address is whether there is any federal statute, regulation or policy which specifically prescribes a course of conduct for the defendants. The government argues that the Park Service is obligated to promote the preservation of lands in their natural state, not provide the swiftest or safest flow of traffic. Moreover, considerations of the environmental aesthetics compete with safety and eco-

nomics in determining how the Park Service's roads are to be maintained. Therefore, the government argues that the broad policies outlined in 16 U.S.C. §1 would be applicable to the Park Service's treatment of Route 209 in the Delaware, Water Gap Recreation Area, meaning the discretionary function exception applies. In support of its motion, the government attaches the declaration of Mark Spadea[3], Civil Engineer, employed by the U.S. Department of Interior, National Park Service, Northeast Region Philadelphia Support Office. In his declaration, Mr. Spadea states that there are no mandatory rules, regulations or directives which would require the National Park Service to construct guardrails at U.S. Route 209 culvert locations or to reconstruct Route 209 to change the grades of the roadway foreslopes. Mr. Spadea states that:

> 8. The NPS Park Road Standards guideline provides in relevant part that:
>
> > Wherein terrain conditions and park resources permit, backslopes, foreslopes, and roadside drainage channels ***should*** have gentle, well rounded transitions. . . The maximum rate of foreslope depends on terrain conditions and the stability of soils determined by local experience. . .
> >
> > The ditch foreslope used in design ***should*** be related to design speed, type of terrain, soil types, and resource management considerations. Preferably, the ditch foreslope ***should*** be 6:1 for urban parkways and 4:1 for Class I Park Roads. The first 10 feet of the fill slope

---

[3] *See* Document 25, Exhibit 1.

> ***should*** also be 4:1 where practical to provide emergency pull off, yet discourage random parking.
>
> Guardrail or guardwalls ***should*** be installed at points of unusual danger such as sharp curves and steep embankments, particularly at those points that are unusual compared with the overall characteristics of the road. The criteria used for warranting guardrail installation on high speed, high volume highways do not apply to the low speed, low volume traffic conditions on most park roads. (emphasis added).

9. The NPS is obligated pursuant to 16 U.S.C. §1 to:

> promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, . . . as provided by law, by such means and measures as conform to the fundamental purpose of said parks, monuments, and reservations which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such a manner as will leave them impaired for the enjoyment of future generations.

In addition, Mr. Spadea states that the National Park Service standards for foreslopes and guardrail installation grant significant discretion to park managers to determine appropriate roadway conditions in units of the National Park system and allow park managers to

weigh and consider visitor safety along with aesthetics and budgetary considerations in determining the manner in which park roads are maintained. Park managers have determined that the foreslope grade and the policy of not placing guardrails in front of culverts on U.S. Route 209 are appropriate taking into consideration a variety of factors including visitor safety, visual characteristics, and availability of financial resources. The National Park Service has not installed any guardrails in new locations on U.S. Route 209, except to close off an old entrance to the redesigned Bushkill Boat Access facility.

In opposition to the motion for summary judgment, plaintiff argues that the National Park Service clearly has an established policy of safety considerations relating to highway maintenance. Specifically, plaintiff points to 23 C.F.C. 1230, the American Association of State Highway and Transportation Official publications, Roadside Design Guide, Guide for Selecting, Locating and Designing Barriers, and A Policy on Geometric Design of Highways and Streets as referenced in the Report prepared by plaintiff's expert, Lance E. Robson, P.E.[4] While plaintiff has set forth numerous regulations and policies which she argues apply to the National Park Service, and in particular Route 209, we do not agree that these are mandatory directives which apply to Route 209.

Having determined that there is no federal statute, regulation or policy which specifically prescribes a course of conduct for defendants, we must turn to the second inquiry, that is, whether the challenged action or inaction is the kind that the discretionary function

---

[4] *See* Document 31, Exhibit B.

exception was designed to shield, keeping in mind that the discretionary function exception insulates the government from liability if the action involves the permissible exercise of policy judgment.

In the instant action, the plaintiff complains that the National Park Service failed to repair a drop off at the edge of the pavement, to create a traversable inlet at a culvert alongside the road or to post a warning sign, and thus negligently caused plaintiff's injuries. The government argues that the challenged conduct, the design and maintenance of the areas set forth by plaintiff, fall within the agency's policy mission and goals. In support of its argument, the government cites *Baum v. United States*, 986 F.2d 716 (4th Cir. 1993)[5] and *Fahl v. U.S. Dept. Interior*, 792 F. Supp. 80 (D. Ariz. 1992).[6] In particular, the government argues that

---

[5] In *Baum v. United States*, the court addressed the issue of negligence of the National Park Service in the design, construction and maintenance of the guardrail system in place on the Fort Meade Road Bridge. After finding no mandatory law governing the design and construction of the parkway guardrails, the court found that the design and construction decisions involving the guardrails was bound up in economic and political policy considerations and was the kind of planning level decisions protected by discretionary function exception. The court also found that the Park Service's judgment involving when and how to maintain its bridges and guardrails is of the type normally involving considerations of economic, social or political policy. The court found that the Park Service's judgment with regard to maintenance also fell within the discretionary function exception.

[6] In *Fahl v. U.S. Dept. of Interior*, the court held that the failure to post warning signs or guardrails on the South Rim of the Grand Canyon was a permissible exercise of judgment by the National Park Service and was grounded in social, economic or political policy. Thus, the discretionary function exception shielded the government from liability.

considerations of the environmental aesthetics compete with safety and economics in determining how the Park Service's roads are to be maintained and that the broad policies outlined in 16 U.S.C. §1 would be applicable to the Park Service's treatment of U.S. Route 209.

Plaintiff asserts the failure of the Park Service to act in the instant situation did not involve the implementation of any kind of regulatory scheme nor the advancement of any considerations typically associated with the management of park lands. Plaintiff submits that the complaints raised by plaintiff could have been resolved by the addition of a couple of yards of asphalt to eliminate the drop off and the creation of a traversable inlet, along with the placement of a low shoulder sign. Plaintiff argues that these inactions or omissions by the National Park Service did not reflect the exercise of judgment grounded in social, economic or political policy. We agree. We do not believe that the Park Service's mission of promoting public use of the national parks while preserving them for the enjoyment of future generations, 16 U.S.C. §1, was exercised in the instant failure to maintain the areas in question along Route 209 or the failure to place a warning sign. *Gotha v. United States*, 115 F.3d 176 (3d Cir. 1997). *See also Ara Leisure Services v. United States*, 831 F.3d 193 (9th Cir. 1987); *Sevler v. United States*, 832 F.2d 120 (9th Cir. 1987); *Summers v. United States*, 905 F.2d 1212 (9th Cir. 1990). Accordingly, we conclude that the discretionary function exception is not applicable in this case.

The next argument raised by the government is that plaintiff is not entitled to relief because the National Park Service did not owe plaintiff any duty of care under the circumstances under the law of the Common-

wealth of Pennsylvania. We believe that under Pennsylvania law, the question of whether or not Route 209, where plaintiff's accident occurred, was in a reasonably safe condition for travel is a factual issue which should be left to the finder of fact. *Fidanza v. Commonwealth, Department of Transportation*, 655 A.2d 1076 (Pa. Commw. 1995). Accordingly, we will deny the government's motion for summary judgment.

MOTION TO BIFURCATE

Defendant filed a motion to bifurcate the trial as to liability and damages. After reviewing the briefs submitted by the parties, we will deny the motion to bifurcate for the reasons stated in the opposition brief plaintiff.

An appropriate Order will follow.

Date: June 3, 1998 /s/ A. R. CAPUTO
A. RICHARD CAPUTO
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

No. 3:CV-96-0897
(Judge Kosik)

DEBBIE MITCHELL, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: June 4, 1998]

ORDER

NOW, this 3rd day of June, 1998, it is hereby ordered:

(1) The defendant's motion for summary judgment [Doc.# 23] is denied;

(2) The defendant's motion to bifurcate trial [Doc.# 18] is denied; and

(3) A non-jury trial will be scheduled forthwith.

/s/ A. R. CAPUTO
A. RICHARD CAPUTO
United States District Judge